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No. 04-1264

IN THE

Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,

Petitioner,

v.

JOHN A. CARDEGNA AND DONNA REUTER,

Respondents.

On Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Plaintiffs effectively ask this Court to overrule not just one but two landmark decisions that have governed the enforceability of arbitration agreements in this Nation for decades: (1) *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), and (2) *Southland Corp. v. Keating*, 465 U.S. 1 (1984). In *Prima Paint*, this Court held as a matter of federal substantive law that a challenge to the validity of an underlying contract is severable from a challenge to the validity of an embedded arbitration clause, and in *Southland*, this Court held that federal substantive law governing arbitrability applies in state courts. Those two precedents control the resolution of this case: under the Federal Arbitration Act ("FAA"), plaintiffs cannot avoid enforcement of their arbitration agreement in either federal or state court by challenging the underlying contract on grounds unrelated to the arbitration agreement.

Plaintiffs insist, however, that *Prima Paint*'s severability rule is not a rule of federal substantive law, but "a matter of federal court procedure ... that applies *only* in federal court proceedings." Resp. Br. 18 (emphasis in original). Putting aside the fact that plaintiffs failed to advance this argument in their opposition to the petition for certiorari (or at any other point in these proceedings), the argument is squarely inconsistent with the FAA as interpreted in *Prima Paint*. That case specifically held that the severability of an arbitration clause is "substantive" federal law enacted under the Commerce Clause, *see* 388 U.S. at 400, 404-05, and this Court subsequently built on that holding by specifying that the substantive federal law of arbitration applies in state as well as federal court, *see Southland*, 465 U.S. at 11-12. Plaintiffs may disagree with *Prima Paint* and *Southland*, but they cannot pretend that those cases did not hold what they did.

Nor can plaintiffs sidestep *Prima Paint* by arguing that its federal severability rule does not come into play if the underlying contract is challenged as void, rather than voidable,

under state law. The whole point of the rule is that a party cannot avoid an arbitration agreement by simply challenging the underlying contract in which it is embedded. The *nature* of the challenge to the underlying contract, and the state-law severability implications of that challenge, are immaterial; what matters is that the challenge is directed at the underlying contract, as opposed to the arbitration clause itself. To say that *Prima Paint*'s federal severability rule does not come into play until *after* a court applies a state severability rule is, for all intents and purposes, to deny the federal rule. Thus, contrary to plaintiffs' assertion, the issue here is not whether to adopt a "new rule of federal contract law," Resp. Br. 9; rather, it is whether to retain an old rule of federal arbitration law.

Let there be no mistake about it: the issue here is not (as plaintiffs repeatedly assert, *see, e.g.*, Resp. Br. 1, 7, 8, 18, 19, 20, 35) whether to "extend" *Prima Paint*, but whether to gut that decision (as well as *Southland*). At bottom, plaintiffs (and their *amici*, who are more candid on this score) are arguing that those cases were wrongly decided, and that the FAA neither establishes federal substantive law nor applies in state court. Those arguments, however, are addressed to the wrong forum. If plaintiffs and their *amici* do not like these longstanding statutory precedents, upon which innumerable contracts have been based, they are free to make their case to Congress. But they have provided no reason for this Court to do their work for them.

The reason that *Prima Paint* and *Southland* have stood the test of time is no mystery: those decisions are eminently sensible. The federal severability rule prevents parties from avoiding their agreements to arbitrate by challenging their underlying contracts on grounds unrelated to arbitration, and the application of that substantive rule in state as well as federal court prevents forum shopping. In sharp contrast to the indeterminate and inconsistent approach suggested by plaintiffs,

this regime is workable and predictable—which may explain why all six federal circuits confronted with the question presented here had no trouble concluding (without dissent) that *Prima Paint*'s federal severability rule governs a challenge to an underlying contract based on illegality. This Court should decline plaintiffs' invitation to overturn this settled law.

ARGUMENT

I. *Prima Paint* Established A Substantive Rule Of Federal Law Applicable In Both Federal And State Court.

Plaintiffs argue as a threshold matter that *Prima Paint*'s federal severability rule does not apply here at all, because this case arises from state, not federal, court. *See* Resp. Br. 13-19. That argument fails on both procedural and substantive grounds.

A. Plaintiffs Waived The Argument That *Prima Paint* Does Not Apply In State Court.

As an initial matter, plaintiffs waived the argument that *Prima Paint* does not apply in state court by failing to raise that argument in their opposition to the petition (or at any other previous stage of this litigation). The petition presented the question whether the Florida Supreme Court erred by deciding this case "consistent with the Alabama Supreme Court but in direct conflict with six federal courts of appeals." Pet. i. If plaintiffs believed that this alleged conflict was illusory because *Prima Paint* does not apply in state court at all, they were required to say so in their opposition brief. *See, e.g.*, S. Ct. Rule 15.2; *Baldwin v. Reese*, 541 U.S. 27, 34 (2004); Robert L. Stern *et al.*, *Supreme Court Practice* § 6.37, at 450-51 (8th ed. 2002). Plaintiffs, however, said nothing of the sort; rather, they acknowledged the conflict and simply argued that the contrary federal decisions were "mistaken," "indefensible," and "simply wrong." Pet. Opp. 21-22. Because plaintiffs' new argument does not relate to *this* Court's power to decide the case, and

hence is not "jurisdictional," this Court should deem it waived. *See, e.g., South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999); *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

Plaintiffs offer three reasons why their new argument "is properly before the Court," Resp. Br. 13-14 n.4, but none is availing. *First*, plaintiffs contend that the Florida Supreme Court "explicitly addressed" the argument. *Id.* That contention is simply untrue: the Florida court attempted to distinguish *Prima Paint* on the merits, but never suggested that the case did not apply in state court at all. *See* Pet. App. 5a-7a. *Second*, plaintiffs invoke "this Court's traditional rule that once a federal claim is properly presented, a party can make any argument in support of that claim." Resp. Br. 14 n.4 (internal quotation omitted). But that rule on its face does not apply here, where the disputed "federal claim" is *Buckeye*'s claim that the FAA requires arbitration of the underlying lawsuit. Instead, plaintiffs are governed by the rule that "the prevailing party ... is entitled to defend the judgment on any ground *that it properly raised below*," *Jones v. United States*, 527 U.S. 373, 396 (1999) (emphasis added), which does not help them because they never raised this argument below. *Third*, plaintiffs assert that their new argument is "predicate to an intelligent resolution of the question presented." Resp. Br. 14 n.4 (internal quotation omitted). But plaintiffs' new argument applies only to cases in state court, and the question presented here also arises in federal court, so it can be "intelligently resolved" without addressing the new argument.

B. *Prima Paint* Applies in State Court.

If this Court nonetheless exercises its discretion to reach the merits of plaintiffs' new argument that *Prima Paint* does not apply in state court, that argument can readily be dismissed. Plaintiffs contend that *Prima Paint*'s federal severability rule is merely "a rule of *procedure* governing the allocation of authority between federal courts and arbitrators that Congress

created pursuant to its power to regulate proceedings in federal courts." Resp. Br. 16 (emphasis added); *see also id.* at 18 ("[T]he separability rule [of *Prima Paint*] is a matter of federal court procedure."). That contention is manifestly incorrect.

The very question presented in *Prima Paint* was whether the FAA establishes a *substantive* federal severability rule that preempts contrary state law. This Court unequivocally answered that question in the affirmative, "agree[ing]" with the Second Circuit that the severability rule is "one of 'national substantive law'" that "governs even in the face of a contrary state rule," 388 U.S. at 400 (and rejecting the First Circuit's contrary view that "the question of 'severability' is one of state law," *id.* at 403). Contrary to plaintiffs' assertion, *Prima Paint* did not hold that the FAA was based on Congress' power over the federal courts, but instead on Congress' commerce power. *See id.* at 405 ("[I]t is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of control over interstate commerce and over admiralty.") (internal quotation omitted).

If *Prima Paint* itself left any doubt on this score, moreover, subsequent rulings have dispelled it. In *Southland*, this Court reaffirmed *Prima Paint*'s holding that the FAA creates substantive federal law enacted under Congress' commerce power. *See* 465 U.S. at 11 ("The [FAA] rests on the authority of Congress to enact substantive rules under the Commerce Clause."); *id.* ("The [*Prima Paint*] Court relied for [its] holding on Congress' broad power to fashion substantive rules under the Commerce Clause."). Indeed, as *Southland* noted, the statutory requirement of a "contract evidencing a transaction involving commerce," 9 U.S.C. § 2, would be inexplicable if the statute were *not* enacted under Congress' commerce power. 465 U.S. at 14. *Southland* further made explicit "what was implicit in *Prima Paint*, *i.e.*, the substantive law the Act created [is] applicable in state and federal court." *Id.* at 12.

And in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), this Court reaffirmed not only *Prima Paint*'s holding that the FAA establishes "substantive" federal law enacted under the Commerce Clause, *id.* at 271, but also *Southland*'s holding that such substantive federal law applies in both state and federal court, *see id.* at 271-72.

Because *Southland* and *Allied-Bruce* leave no doubt that the FAA's substantive provisions apply in state as well as federal court, plaintiffs try to circumvent those cases by arguing that *Prima Paint*'s federal severability rule is not substantive at all. According to plaintiffs, "*Prima Paint*'s holding was grounded in the language of 9 U.S.C. § 4," which they claim is merely a procedural provision governing the enforcement of arbitration agreements in federal court. Resp. Br. 6. That argument is not only incorrect but perverse, since (as noted above) the very foundation for *Southland*'s holding that the FAA's substantive provisions apply in state court was *Prima Paint*'s antecedent holding that the FAA created substantive federal law (specifically, a severability rule) in the first place.

Thus, even assuming that plaintiffs are correct in arguing that § 4 of the FAA does not apply of its own force in state court—an issue this Court expressly left open in *Southland*, *see* 465 U.S. at 16 n.10—that argument misses the point. This case is not about the arguably procedural provisions of § 4, but about the indisputably substantive provisions of § 2. Statutes must be read as a whole, and FAA § 4 gives meaning to FAA § 2. *See, e.g., Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956) (FAA sections "are integral parts of a whole" that must be read together); *cf. Prima Paint*, 388 U.S. at 400 ("The key statutory provisions are §§ 2, 3, and 4 of the [FAA]."). Although § 2 on its face focuses on the enforceability of the arbitration "provision" itself, and thus suggests that this issue is distinct from the enforceability of the underlying "contract," that section itself did not expressly answer the severability

question presented in *Prima Paint*. Not surprisingly, the Court thus turned for guidance to the other sections of the statute. Because § 4 orders a federal court to compel arbitration once the "the making of *the agreement for arbitration* or the failure to comply therewith is not in issue," 9 U.S.C. § 4 (emphasis added), it logically follows that the "grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, which a court may consider before enforcing the arbitration agreement, are limited to grounds involving the arbitration agreement itself (as opposed to the underlying contract).

Indeed, plaintiffs' argument that *Prima Paint*'s severability rule is "procedural" rather than "substantive" in nature turns those terms upside down. Whether a particular contractual provision is severable from the underlying contract has nothing to do with judicial "procedure," and everything to do with "substance." That is why *Prima Paint*'s rule preempts contrary state substantive law, *see* 388 U.S. at 402-04, and why that rule applies in state as well as federal court (as the court below assumed and many state courts have recognized, *see*, *e.g.*, *Eddings v. Southern Orthopedic & Musculoskeletal Assocs., P.A.*, 555 S.E.2d 649, 655 (N.C. App. 2001), *rev'd on other grounds*, 569 S.E.2d 645 (N.C. 2002); *Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 604 So. 2d 332, 336-37 (Ala. 1991)). Plaintiffs tellingly do not cite a single decision under the FAA holding that *Prima Paint* does not apply in state court.

As a policy matter, of course, the foregoing conclusion is eminently sensible, since there would be little to recommend a rule that treated arbitration clauses as severable in federal court but not in state court (particularly since parties have no way of knowing *ex ante* if an eventual dispute will wind up in federal or state court). Under plaintiffs' regime, an arbitration agreement would be enforced in a diversity case filed in or removed to federal court, but not in the state court across the street. Such a rule would only encourage the very forum-

shopping and gamesmanship that this Court rejected in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938), by holding that federal courts sitting in diversity should not apply different substantive law than state courts. Indeed, this compelling consideration underlies *Southland*, which recognized that it would be most odd to think that Congress exercised its powers under the Commerce Clause to create federal substantive arbitrability law, but then limited such law to the federal courts. 465 U.S. at 15-16; *see also Allied-Bruce*, 513 U.S. at 272; *cf. Prima Paint*, 388 U.S. at 424-25 (Black, J., dissenting); *Bernhardt*, 350 U.S. at 203-04.

Several of plaintiffs' *amici* are candid enough to admit that their real grievance is not with the application of *Prima Paint per se* in state court, but with the application of *any* provision of the FAA in state court. In their view, both *Southland* and *Allied-Bruce* (not to mention *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Volt Info. Scis., Inc. v. Board of Trs. of the Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989); and *Perry v. Thomas*, 482 U.S. 483 (1987), all of which applied the substantive provisions of the FAA in cases arising from state court), should be overruled. This Court can readily dispose of that argument.

As an initial matter, the *Southland* line of cases flows inexorably from *Prima Paint*'s holding that the FAA established substantive federal law enacted under the commerce power. Indeed, in light of *Prima Paint*, most state courts recognized even *before Southland* that the FAA applies in state court. *See, e.g., Burke Cty. Pub. Schs. Bd. of Ed. v. Shaver P'ship*, 279 S.E.2d 816, 824 & n.15 (N.C. 1981) (collecting cases); *cf. Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 407 (2d Cir. 1959) (FAA's substantive severability rule applies in both federal and state court), *cert. granted*, 362 U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960).

The *amici* who urge this Court to overrule *Southland* have no answer to the obvious question why Congress would have wanted to establish substantive federal law applicable only in federal court, thereby leaving state courts free to discriminate against and otherwise thwart arbitration at will. To make their *Southland* argument, thus, *amici* fall back on the theory that the FAA simply established procedural rules governing the enforcement of arbitration agreements in federal court. But that argument is directed not against *Southland*, but against *Prima Paint*.

The relevant question, however, is not whether either *Prima Paint* or *Southland* was correctly decided as an original matter, but whether the proponents of overruling either or both of those cases have met their heavy burden of justifying such an extraordinary step. They have not even come close. "Time and time again, this Court has recognized that the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (internal quotation omitted); *see also id.* ("Adherence to precedent promotes stability, predictability, and respect for judicial authority.").

Prima Paint has been on the books for almost four decades, and *Southland* for more than two. Just over a decade ago, this Court expressly considered, and squarely rejected, a request to overrule *Southland*. *See Allied-Bruce*, *see* 513 U.S. at 271-72. Congress has shown no inclination to amend the FAA in light of any of those decisions. As this Court has stated time and again, *stare decisis* is at its zenith in statutory cases—especially where, as here, private contracts are written in reliance on a particular interpretation of a statute. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989); *cf. Allied-Bruce*, 513 U.S. at 283-84 (O'Connor, J., concurring). Indeed, in its most recent decision applying the FAA in a case arising from

state court, this Court did not even address the argument presented by *amici* that the *Southland* line of cases should be overruled. *See Bazzle*, 539 U.S. at 444. It would be particularly inappropriate to take such a dramatic and expectation-upsetting step where, as here, that issue was not even raised at the petition stage (and hence petitioner had no reason to address this issue in its opening brief, and no *amicus* had any reason to address that issue on petitioner's behalf).[1] Accordingly, this Court should decline the invitation to topple the entire edifice of substantive federal arbitration law.

II. The Application Of *Prima Paint*'s Severability Rule Does Not Depend On The Ground On Which The Underlying Contract Is Challenged.

Plaintiffs next argue that *Prima Paint*'s federal severability rule does not apply where, as here, the underlying contract containing an arbitration clause is challenged on grounds that would render it *void* (as opposed to *voidable*) under state law. Again, they are mistaken.

The whole point of *Prima Paint* is that a challenge to the validity of an underlying contract is severable from a challenge to the validity of an embedded arbitration agreement: as long as the party is not challenging the making of the arbitration agreement, any challenge to the underlying contract must be presented to the arbitrator in the first instance. *See* 388 U.S. at 402-04. That rule advances the strong federal policy favoring arbitration by preventing parties (like plaintiffs here) from

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[1] Indeed, this case does not even squarely present the issue whether the FAA applies of its own force in state court, because the parties here *agreed in their contract* that "[t]his arbitration Agreement ... shall be governed by the Federal Arbitration Act ('FAA'), 9 U.S.C. Sections 1-16." JA 36, 38, 40, 42. Where parties agree to be governed by the FAA (or, conversely, not to be governed by the FAA, *see, e.g., Volt*, 489 U.S. at 478-79), there is no reason not to respect that agreement. Thus, regardless of one's views regarding *Southland*, *cf. Bazzle*, 539 U.S. at 460 (Thomas, J., dissenting), the FAA should apply here.

evading their arbitration obligations by simply challenging the underlying contract on grounds (like usury) unrelated to the arbitration agreement. *See id.* at 404.

Plaintiffs recognize that *Prima Paint* "hold[s] that the FAA creates a separability rule," Resp. Br. 14, and do not purport to dispute that rule. Rather, they contend, before a court applies the federal severability rule, it must first entertain any challenge to the underlying contract that, under state contract law, would render the underlying contract void *ab initio*. *See id.* at 20-25. That approach is commanded, they assert, by the "plain language" of FAA § 2. *Id.* at 2, 19, 20. In their view, an arbitration provision embedded in a contract that is void *ab initio* under state law is not an arbitration provision "in" or "arising from" a "contract" within the meaning of § 2. *See id.* at 20-25; *see also id.* at 27 ("[T]he language of the FAA require[s] that a court find that a 'contract' exists *before* attempting to enforce the FAA.") (emphasis in original).

That approach turns *Prima Paint* on its head: to argue that *Prima Paint*'s federal severability rule does not come into play until *after* a court resolves a challenge to the underlying contract, and applies a state severability rule, is to negate the federal rule. If a court must entertain a challenge to the underlying contract before enforcing the arbitration clause, then the arbitration clause is not severable. Nothing in *Prima Paint*, however, remotely suggests that the *nature* of the challenge to the underlying contract (or the state-law severability implications of that challenge) has any bearing on the operation of the federal severability rule. Indeed, a principal virtue of that rule is that it can be applied (and arbitration enforced) *without regard* to the validity or enforceability of the underlying contract.

In essence, thus, plaintiffs are asking this Court to hold that the FAA does not create a federal substantive rule of severability, so that the severability inquiry turns on state law.

See, e.g., Resp. Br. 31 ("Far from creating a federal rule that might conflict with Florida law in this case, the FAA *entrusts* states with determining the law in this area.") (emphasis in original). Whatever the merits of that argument as an original matter, it is squarely inconsistent with *Prima Paint*. Indeed, plaintiffs' position is essentially indistinguishable from Justice Black's dissent in *Prima Paint*, which sharply criticized the Court for "hold[ing] that the [FAA], as a matter of federal substantive law, compels a party to a contract containing a written arbitration provision to carry out his 'arbitration agreement' even though a court might ... hold the entire contract—including the arbitration agreement—*void* because of fraud in the inducement." 388 U.S. at 407; *see also id.* ("The Court holds, what is to me fantastic, that the legal issue of a contract's *voidness* because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties.") (emphasis added).

Plaintiffs' assertion that the "plain language" of § 2 commands a different result here than in *Prima Paint*, Resp. Br. 2, 19, 20, is baseless. Plaintiffs place quotation marks around the word "contract" in the text of the statute to suggest that the word creates a "threshold" requirement for a court to entertain challenges to the underlying contract, Resp. Br. 7, 8, 11, 15, 19, 25, 30, even where, as here, those challenges do not relate to the arbitration provision. But this novel "textual" argument—which no court has ever addressed, much less adopted—is entirely question-begging. The statute does not say, as plaintiffs would have it, that the arbitration provision must be included in a *legally valid* and *enforceable* "contract." That was the very issue in *Prima Paint*, where the plaintiff sought rescission of the entire contract under state law on the ground of fraud in the inducement. The *Prima Paint* Court did not begin its analysis by considering whether a rescission suit under New York law negated the existence of a "contract." To the contrary, the Court candidly admitted that it did not care about the

implications of a rescission suit under New York state law—an issue that was "not entirely clear." 388 U.S. at 400 n.3. Rather, because the Court decided that the severability issue was governed by federal law under the FAA, it "need[ed] not decide the status of the issue under New York law." *Id.*

Indeed, by focusing on the word "contract" in isolation, plaintiffs read the statute out of context. Precisely because the FAA (as noted above) was enacted under the Commerce Clause, the statute on its face applies only to an arbitration provision in "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Contrary to plaintiffs' position, thus, the key issue is not whether there is an underlying "contract" *per se*—which is a given—but whether that contract "evidenc[es] a transaction involving commerce." If the existence of a legally valid and enforceable "contract" under state law were a prerequisite to application of the FAA, then *Prima Paint* would have had to grapple with this issue, and (if the *Prima Paint* petitioner's description of New York rescission and severability law was correct, *see* Br. for Pet'r 21-22 & n.15, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (No. 66-343), Reply Br. for Pet'r 7-10, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (No. 66-343)) would have come out the other way. Indeed, Justice Black dissented on just this ground. *See id.* at 412-13 ("Sections 2 and 3 of the Act assume the existence of a *valid* contract. They merely provide for enforcement where such a *valid* contract exists.") (emphasis added); *id.* at 421 ("Under New York law, ... general allegations of fraud in the inducement would, as a matter of state law, put in issue the making of the arbitration clause.").

Plaintiffs' suggestion that *Prima Paint* created a unique federal rule for fraud-in-the-inducement challenges thus fails on its own terms. Under plaintiffs' approach, a court asked to compel arbitration must in every case analyze a challenge to an

underlying contract under state law to determine whether that challenge implicates "contract formation." Resp. Br. 6, 8, 10, 18, 30-31, 46. That would be true even where, as in *Prima Paint*, the contract is challenged on fraud-in-the-inducement grounds, because it is obviously possible for a State to have a rule that fraud in the inducement (at least where, as in *Prima Paint* itself, rescission is sought) negates the formation of a "contract." *See, e.g., Henderson v. Coral Springs Nissan, Inc.*, 757 So. 2d 577, 578 (Fla. Dist. Ct. App. 2000) ("[R]escission ... makes a contract void in its inception as though it never existed."); *cf. Prima Paint*, 388 U.S. at 412 (Black, J., dissenting) ("If the contract was procured by fraud, then, unless the defrauded party elects to affirm it, *there is absolutely no contract*, nothing to be arbitrated.") (emphasis added). The "void/voidable" distinction proposed by plaintiffs, in other words, does not provide a basis for distinguishing *Prima Paint*, because that distinction is based on *state* law whereas *Prima Paint* is based on *federal* law. That is why plaintiffs are necessarily asking this Court to replace *Prima Paint*'s federal severability rule with state law.[2]

Plaintiffs thus suggest, without admitting it, that *Prima Paint* itself conflicts with the "plain language" of the FAA, which requires courts to deem arbitration provisions "valid,

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[2] It is simply not true, as plaintiffs assert, that "[i]n *Prima Paint*, this Court faced a situation where a contract *unquestionably* existed." Resp. Br. 20 (emphasis modified); *see also id.* (asserting that in *Prima Paint* "there [was] *no dispute* that a contract ha[d] been formed") (emphasis modified); Br. of Law Professors as *Amici Curiae* in Support of Resps. 9 ("In *Prima Paint, no issue was raised* as to whether there was a contract.") (emphasis added). As noted in the text, that issue was indeed disputed—not least of all, in Justice Black's vigorous dissent. *See* 388 U.S. at 412-13, 421. Plaintiffs' argument that "Buckeye puts the cart before the horse: it demands that courts assume that an arbitration provision meets the requirements of § 2 and enforce the clause, before the court has resolved the threshold question of whether a contract exists at all," Resp. Br. 25, is thus an argument against *Prima Paint*, not an argument for distinguishing that case.

irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (emphasis added). Plaintiffs' position boils down to the proposition that the "grounds ... for the revocation of any contract" include non-severability. But non-severability is not a ground "for the revocation of any *contract*," *id.* (emphasis added); rather, it is a ground for denying effect to provisions embedded *within* a contract. Again, were that not so, *Prima Paint* itself would have come out the other way, because the plaintiff there was indeed seeking to "revo[ke]" the underlying contract. As noted above, the whole point of *Prima Paint* is that an arbitration clause must be treated as distinct from the underlying contract in which it is embedded, so that the "grounds ... for the revocation of any contract" are limited to grounds *specific to the arbitration agreement itself.* Justice Cantero made precisely this point in his dissent below, explaining that the FAA "treat[s] arbitration clauses not as a class of 'super' clauses, but as a class of *separate* clauses—separate, that is, from the other clauses in a contract." Pet. App. 20a (dissenting opinion; emphasis in original). Thus, regardless of state severability law, the FAA does not allow a party to transfer any "taint" from an underlying contract to the arbitration provision; once it is clear that the party is not challenging the making of the arbitration provision itself, the court's role is at an end.

Prima Paint thus refutes plaintiffs' efforts to use the word "contract" as a Trojan horse to smuggle into the § 2 analysis all of the various grounds for challenging a contract under state law. *See, e.g.*, Resp. Br. 22 ("Whenever two parties assent to something, they may have an agreement, but that does not mean that they have a 'contract.'"). Parties may challenge a contract on any number of grounds under state law—*e.g.*, fraud in the inducement, illegality, violation of public policy, lack of essential terms, lack of consideration, or lack of mutuality—but they may not challenge an arbitration provision on grounds

unrelated to that provision. Thus, where (as in *Prima Paint* and here) it is clear that the parties have agreed to arbitrate their dispute, that challenge must be presented to the arbitrator in the first instance.[3]

Indeed, as *Prima Paint* recognized, a contrary rule would undermine "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." 388 U.S. at 404; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) (noting "Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible"). The whole point of arbitration is to minimize the cost and delay of litigation. Forcing the parties into protracted litigation over whether the case belongs in arbitration in the first place obviously defeats that purpose—just as protracted litigation over immunity would defeat the whole purpose of immunity, *see, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This case is a perfect example: for a court to resolve what plaintiffs call their

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[3] Plaintiffs cannot, and do not, dispute the premise on which the petition was granted: that their challenge is directed entirely at the allegedly usurious terms of the underlying contract, and relates to the embedded arbitration agreement only insofar as state law would deem the latter agreement inseverable from the underlying contract. In particular, plaintiffs do not deny as a factual matter that they assented to arbitration, or challenge any provision of the arbitration agreements themselves (as opposed to the underlying contracts) as illegal or otherwise unenforceable. *See, e.g.*, Pet. App. 12a ("Cardegna does not dispute that he assented to the arbitration agreement.") (Bell, J., specially concurring); Pet. App. 32a ("Here, appellees did not argue that they did not enter into the arbitration agreement."); Pet. App. 10a ("It is also important to note that Cardegna does not claim that the arbitration clause itself (separately, as opposed to the contract as a whole) somehow is invalid.") (Bell, J., specially concurring); Pet. App. 28a ("[A]t the hearing before the trial court, [plaintiffs] did not argue that the arbitration provision was unconscionable. Accordingly, the issue of unconscionability is not properly before this court for review.").

"threshold" challenge to the legality of the underlying contracts, Resp. Br. 7, 8, 11, 15, 19, 25, 30, would be for the court to resolve the entire case. That is why the FAA "calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses," *Moses H. Cone*, 460 U.S. at 29, and the *Prima Paint* severability rule promotes such disposition. As this Court asked rhetorically in *Allied-Bruce*: "Why would Congress intend a test that risks the very kind of costs and delay through litigation (*about the circumstances of contract formation*) that Congress wrote the Act to help the parties avoid?" 513 U.S. at 278 (emphasis added).

In light of *Prima Paint*, plaintiffs' heavy reliance on the background "presumption against preemption"—which plaintiffs actually deem "decisive" here, Resp. Br. 6—is thus mystifying. It is certainly true, as a general matter, that courts should not lightly interpret federal statutes to displace state law. But that general maxim (to which plaintiffs devote the entire first section of their argument, *see* Resp. Br. 9-13) adds nothing to the analysis here. *Prima Paint* crossed the preemption bridge by holding that the FAA creates a federal substantive rule of severability that preempts inconsistent state law. Plaintiffs here may not like that rule, but they are not writing on a blank slate. Invoking the "presumption against preemption" provides no basis for gutting *Prima Paint*.

It is no answer to argue, as plaintiffs do, that "arbitration clauses are governed by state, not federal, contract law except in those instances where state law targets arbitration clauses for treatment that is inferior to other types of contracts." Resp. Br. 32; *see also id.* at 33 ("[T]he FAA merely places arbitration agreements on the same footing as other agreements."). Once again, that argument is squarely inconsistent with *Prima Paint*, which held that the FAA preempts state severability law *without regard* to whether that law discriminates against arbitration. *See* 388 U.S. at 402-04. Thus, while it is certainly true that the

FAA preempts state laws that discriminate against arbitration, it is not true that the FAA preempts *only* state laws that discriminate against arbitration. Rather, *Prima Paint* teaches that the FAA also preempts general state severability law to the extent it would treat a challenge to an underlying contract as inseverable from a challenge to an arbitration agreement.

Plaintiffs thus miss the point by insisting that "many jurisdictions have embraced a principle of non-separability for illegal contracts." Resp. Br. 38. New York may have embraced a principle of non-separability for fraudulently induced contracts (at least where the allegedly defrauded party sought rescission), *see* 388 U.S. at 400 & n.3; *see also id.* at 410-11, 421 (Black, J., dissenting), but the *Prima Paint* Court did not care. Rather, *Prima Paint* held that severability under the FAA does not turn on the vagaries of state severability law. Under *Prima Paint*, as noted above, a party is free to attack an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, as long as those grounds are directed at the agreement itself, and not the underlying contract. The "non-separability principle" upon which plaintiffs rely, *see* Resp. Br. 39, is thus alien to the FAA, which treats arbitration agreements as distinct from the underlying contracts in which they are embedded.

For this reason, plaintiffs err by arguing that "to enforce a right arising from an illegal contract is to reward, and thus to encourage, unlawful ... behavior," and that "the integrity of the courts themselves would be compromised by the judicial sanction of unlawful contracts." Resp. Br. 39-40. A court asked to compel arbitration under the FAA has no roving commission to inquire into the validity or enforceability of the underlying contract; rather, its role is limited to resolving any disputes relating specifically to the arbitration agreement. And precisely because the court is not addressing the validity or enforceability of the underlying contract, it does not become a

"handmaid of iniquity," Resp. Br. 40 (internal quotation omitted), by simply enforcing the arbitration agreement. Thus, plaintiffs' "hypothetical agreements providing for the sale of cocaine, or the making of child pornography, or a murder-for-hire," Resp. Br. 41, prove nothing. In the unlikely event that the parties to such an agreement included an arbitration provision therein, and no party challenged that provision itself, the arbitrator would presumably determine in short order that the contract was unenforceable and a reviewing court (in the event that the arbitrator's decision was challenged) would readily affirm. This regime in no way promotes illegality; rather, it promotes arbitration.

Indeed, a contrary regime would effectively nullify the FAA's pro-arbitration policy. Although plaintiffs insist that this case is "unique," Resp. Br. 45, it is not. Plaintiffs' theory is that a court must resolve any challenge that goes to the "formation" of an underlying contract under state law *before* compelling arbitration. *See id.* at 20-25. That theory is in no way limited to challenges based on illegality; it presumably would also extend to challenges based on alleged inconsistency with "public policy," *see, e.g.*, *Vacation Beach, Inc. v. Charles Boyd Constr., Inc.*, 906 So. 2d 374, 377 (Fla. Dist. Ct. App. 2005), lack of essential terms, *Glosser v. Vasquez*, 898 So. 2d 1179, 1181 (Fla. Dist. Ct. App. 2005), lack of consideration, *Office Pavilion S. Fla., Inc. v. ASAL Prods., Inc.*, 849 So. 2d 367, 370 (Fla. Dist. Ct. App. 2003), lack of mutuality, *see, e.g.*, *D.L. Peoples Group, Inc. v. Hawley*, 804 So. 2d 561, 563 (Fla. Dist. Ct. App. 2002), or any of the other myriad grounds for challenging the formation of a contract.

Thus, it is simply not true that "[a] ruling for Plaintiffs here will only affect businesses whose contracts are *wholly illegal*," Resp. Br. 45 (emphasis added), which is presumably why the Chamber of Commerce of the United States of America, the American Financial Services Association, and the American

Bankers Association, among others, have filed *amicus* briefs supporting Buckeye's position in this case. At bottom, plaintiffs are inviting this Court to overturn the predictable, workable, and uniform arbitration regime that has been in place for decades, and this Court should decline that invitation.

CONCLUSION

For the foregoing reasons, the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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